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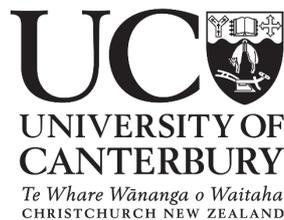
RESEARCH COLLECTION

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## REPORT ON OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2018)

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# REPORT ON OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2018)

HANNAH PETRIE\*



## ABSTRACT

*The OECD Guidelines for Multinational Enterprises (hereafter referred to as the Guidelines) are well-meaning but often poorly executed. This report investigates the role of the New Zealand National Contact Point and makes suggestions for strengthening the implementation of the Guidelines utilising a more proactive approach.*

## *1 Introduction*

From preliminary reading it became apparent the OECD Guidelines for Multinational Enterprises (hereafter referred to as the Guidelines) is a well-meaning idea but is too often poorly executed, and further research only confirmed this notion.

The Guidelines were originally adopted in 1976 and have been since been reviewed on multiple occasions, most recently in 2011.<sup>1</sup> Each country that signs up to the Guidelines must set up a National Contact Point (NCP). The NCP has three main functions: promoting the Guidelines, handling enquiries, and “contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances”.<sup>2</sup> In New Zealand, our NCP (hereafter referred to as NZNCP) is located within the Ministry of Business Innovation and Employment (MBIE), a government agency.

In 2015, Non-Governmental Organisation (NGO) WeCan sought to utilise the guidelines as a mechanism for quake-affected homeowners to deal with poor business conduct from their

\* Submitted as part of the LLM by papers for course LAWS 672-18(C) at the University of Canterbury, supervised by Professor John Hopkins.

<sup>1</sup> OECD 2011 Update of the OECD Guidelines for Multinational Enterprises (2011) at 3.

<sup>2</sup> At 68.

insurance companies which they believed equated to breaches of the Guidelines. In this instance it can be considered that the Guidelines and the NZNCP largely failed these homeowners as claimants. This report highlights failings of the NZNCP and from this, ways in which it can be improved.

Whilst reading this report it is useful to keep in mind the below two points, as they appear to be the essence of the role of the NCP.

- The role of the NCP is to further the effectiveness of the Guidelines.
- The core criteria in which the NCP will operate are visibility, accessibility, transparency and accountability.

## *II Information from MBIE*

On 21 November 2018, I received an email from Michael Hobby who handles the NZNCP, in response to questions asked. The email is detailed below:<sup>3</sup>

- How many earthquake-related claims you have received?

Initially, in late 2013, nearly 50 specific instance complaints were made to the NCP arising from claimants' experiences with insurers, construction firms and government agencies in the aftermath of the Canterbury earthquakes. In 2014, the total number of complaints received rose to 67. Following initial assessments this number was substantially scaled back to two substantive cases which were accepted for further action, with the rest of the complaints being rejected, either because of a lack of supporting information or because the entities complained about were not multinational enterprises. Subsequently a lesser number of more detailed claims was received. The overall total of earthquake-related complaints finally received was 11, from 10 applicants.

<sup>3</sup> Email from Michael Hobby (Ministry of Business, Innovation and Employment) to author regarding earthquake claims received by the NZNCP (21 November 2018).

- How many have been settled?

Of those cases that were received and assessed, one was initially mediated to settlement in 2015 and agreement reached to resolve the complaint, however this was later withdrawn by the complainant. Following a period of consideration, the complainant decided to discontinue the complaint. The case was subsequently closed by the NCP in 2016.

- How many have been discontinued?

As well as the case noted above, eight cases have been closed and/or discontinued.

- How many are still in progress?

Two earthquake-related cases are still in progress, in that the NCP's assessment (communicated to the parties) found that some of the issues raised were material and substantiated and that the offer of good offices to the parties would be useful and further the purposes of the Guidelines. However, there has been no further contact from the claimants to date.

Information for the NZNCP is found on the website for the Ministry of Business, Innovation and Employment (MBIE).<sup>4</sup> The website page is brief but to an extent conveys the necessities. One particularly interesting point on the website is the heading: "Who is expected to follow the Guidelines?". Under this heading, it details, "multi-national businesses are the main focus ... it can also be applied to business with only domestic operations, that is part of an international supply chain".<sup>5</sup> This description is essentially outlining the scope of Guidelines as to who they apply to. Applicability and scope of the Guidelines is arguably an area where the NZNCP has had issues. This will be elaborated on further, when discussing what specifically is letting the NZNCP down.

<sup>4</sup> Ministry for Business Innovation and Employment [MBIE] "OECD Guidelines for Multi-national enterprises" (19 May 2020) <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

<sup>5</sup> MBIE, above n 4.

It is also worth noting that there are only two specific instances available to read on the MBIE website, that of “Mr and Mrs C” and “Mr and Mrs Y”.

### *III The Utility of the OECD Guidelines as a Mechanism for Individuals to Seek Justice*

Currently the Guidelines are the only global corporate responsibility instrument that has been formally adopted by states.<sup>6</sup> Knowing this makes ensuring that the Guidelines are effective all the more important as they are our only deterrent, defence and source of remedy against irresponsible business conduct. Being the only instrument for global corporate responsibility is both an advantage and a disadvantage of the Guidelines. It means that there is no other fall-back mechanism for complainants and thus there is a pressure and need to execute the Guidelines effectively. If NCPs fully embrace and adhere to the Guidelines, they have the advantage of being a clear and cohesive form of global soft law. It ought to be emphasised that the utility of the Guidelines as a mechanism for individuals to seek justice rests largely on the effectiveness of a country’s NCP.

Sanchez, through looking at different NCPs, identified that they have “different conceptions of their roles and powers” when handling complaints.<sup>7</sup> It is from NCP’s different interpretation of the procedural guidance in the Guidelines where the difference in NCPs utility and effectiveness arises. Nations sign up to promoting the Guidelines, which can give the Guidelines a form of legitimacy. The NCPs have the potential to supplement the judicial system as a state-based non-judicial grievance mechanism and provide a remedy for victims. However, many of these advantages are lost in the poor execution.

### *IV Why are NCPs Failing Complainants?*

In regard to the NZNCP, it has been identified that there is a lack of accessibility due to premature rejection of complaints from unreasonably high burdens held in the initial

<sup>6</sup> Jernej Letner Cernic “Corporate Responsibility for Human Rights: A critical Analysis of the OECD Guidelines for Multinational enterprises” (2008) 4 *Hanse Law Review* at 76.

<sup>7</sup> Juan Carlos Ochoa Sanchez “The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation” (2015) 84 *Nordic J Intl L* at 89.

assessment phase. Outcome of specific instance Mr and Mrs C claiming against Southern Response and NZ Permanent Trustees Ltd. Mr and Mrs C's claim is an example of where the NZNCP has applied an unreasonably high threshold on claimants depriving them to the accessibility NCP's are supposed to provide stipulated by procedural guidance. The NZNCP is not alone in this flaw. OECD Watch reported that, from June 2012 to May 2014, there has been a trend among NCPs to reject cases at the initial assessment phase when successful mediation is unlikely and only accept relatively easy cases that can be solved through mediation and dialogue.<sup>8</sup> Mr and Mrs C's specific instance is a pertinent example of the NZNCP applying an unreasonably high threshold. The NZNCP rejected the claim on the basis that that the complaint was not against a multinational enterprise, as the company Southern Response is a Crown-owned company. Whilst Southern Response is a Crown-owned company, there is nothing in the Guidelines that would prevent it being classified as a multinational enterprise. Guidelines state explicitly "a precise definition of multinational enterprise is not required", this gives multinational enterprise a broad and inclusive meaning.<sup>9</sup> The Guidelines further explain that ownership of a multinational enterprise may be "private, state or mixed".<sup>10</sup> Surely the suggestion of state ownership is synonymous with Crown ownership? The Guidelines make the "definition" of multinational enterprise as inclusive as possible, in order to get claims past the initial assessment stage and through to actual mediation, where NCPs can offer their services. It appears that the NZNCP has set an unreasonably high standard of proof that is effectively at the level of "beyond reasonable doubt", the same standard used in criminal proceedings. This sort of standard appears inappropriate for a soft law mechanism and especially inappropriate at the initial assessment phase.

This outright rejection of specific instance complaints and the erroneous reasons for doing so present a major dilemma with the NCP system. OECD Watch noted that rejection of a claim

<sup>8</sup> OECD Watch "Assessment of NCP Performance in the 2013–2014 Implementation Cycle" (2014) <[oecdwatch.org](http://oecdwatch.org)> at 19.

<sup>9</sup> OECD, above n 1, at 17.

<sup>10</sup> At 17.

is far more likely outcome of an NGO-filed complaint.<sup>11</sup> Thus, maybe the earthquake claims brought by WeCan already had the odds stacked against them from the beginning.

The decision made by the NZNCP with Mr and Mrs C's claim is more concerning in light of a case decided by the Norwegian NCP – the 2009 case of ForUM and Friends of the Earth *Norway v Cermaq ASA*, where a complaint was filed against Cermaq ASA for multiple breaches of the Guidelines relating to fish farming and fish feed.<sup>12</sup> However, the principle that can be derived and applied to the Mr and Mrs C case is that the Norwegian Government is the majority shareholder of Cermaq ASA.<sup>13</sup> This case did take a while to be fully concluded, from lodging the complaint in May 2009 to the joint statement being signed in August 2011. During the May 2009 to August 2011 period, the Norwegian NCP was reorganised with a new independent panel of experts who formed the main body who met with all the parties in April 2011.<sup>14</sup> Both parties successfully participated in mediation and were invited to meet again in April 2012 to give an update of the implementation of the joint statement.<sup>15</sup> However, one year after the agreement was reached, the complainants commissioned a study to analyse the impact of the agreement. Sadly, it confirmed that Cermaq ASA still had plenty of work to do before it can be called a leader in responsible business conduct.<sup>16</sup> Specific facts of this case aside, it is the acceptance of this case in the first place that distinguishes it from how Mr and Mrs C's complaint was treated.

In light of the Norwegian case, and then how Mr and Mrs C were treated, it calls into question the principle of “functional equivalence”. The Guidelines stipulate “NCPs will operate in accordance with core criteria of accessibility, transparency and accountability to further the objective of functional equivalence”.<sup>17</sup> That means, regardless of how a NCP is structured, all NCPs should operate to a functional equivalent. It is evident through the divergent position the NZNCP reached that it is not operating at functional equivalence in

<sup>11</sup> Joris Oldenziel and Joseph Wilde-Ramsing “10 Years on: Assessing the Contribution of the OECD Guidelines on Multinational Enterprises to responsible business conduct” OECD Watch (2010) <oecdwatch.org> at 11.

<sup>12</sup> OECD Watch “*ForUM and Friends of the Earth Norway vs Cermaq ASA*” <oecdwatch.org>.

<sup>13</sup> OECD Watch, above n 12.

<sup>14</sup> OECD Watch, above n 12.

<sup>15</sup> OECD Watch, above n 12.

<sup>16</sup> OECD Watch, above n 12.

<sup>17</sup> OECD, above n 1, at 71.

accordance with the core criteria. Rejecting Mr and Mrs C's claim meant the NZNCP was not meeting the core criteria of accessibility or taking the correct interpretation of multinational enterprise provided for by the Guidelines. Without functional equivalence there is "a lack of consistency, of equal treatment and of predictability of the NCP mechanism as a whole, affecting all interested parties".<sup>18</sup> Bernadette Maheandiran has identified that a central issue is the Guidelines "lack clarity over which process to apply in addressing specific instances and the ensuing effects".<sup>19</sup> It is the lack of clarity that is creating inconsistencies amongst NCPs, and Maheandiran points out that "fair procedure would require that cases with like facts are treated the same".<sup>20</sup>

The NZNCP should better acquaint itself with its role to avoid future outcomes that are divergent to other NCPs and do not achieve functional equivalence. The NZNCP's current position on their role and powers regarding complaints creates an uneven playing field. When considering Mr and Mrs C's claim, the NZNCP should have looked to the "Guiding Principles for Specific Instances", which assist the implementation of the Guidelines.<sup>21</sup> The "Guiding Principles for Specific Instances" outlines that NCPs should be impartial, predictable, equitable and compatible with the Guidelines. It is arguable that, in rejecting Mr and Mrs C's claim on the fact that Southern Response is not a multinational enterprise, as it is government owned, the NZNCP was not acting in a predictable manner (by not following the similar Norwegian case *ForUM v Cermaq ASA*) and in a way that is not compatible with the Guidelines, as the NZNCP was not upholding functional equivalence. Commentary given in the Guidelines on making an initial assessment encourages NCPs to consult other NCPs: "In making such an evaluation NCPs could take into account practice among other NCPs" and, also, "how similar issues have been or are being treated in other domestic or international proceedings".<sup>22</sup> Granted, the issue in the Norwegian case is not materially similar to that of Mr and Mrs C, but the issue that prevented their claim being offered mediation did not prevent mediation in Norwegian case. Ultimately, it is the mishandling of claims at the initial

<sup>18</sup> Sanchez above n 7, at 114.

<sup>19</sup> Bernadette Maheandiran "Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System under the OECD Guidelines for Multinational Enterprises" (2015) 20 *Harvard Negotiation Law Review* at 240.

<sup>20</sup> At 240.

<sup>21</sup> OECD, above n 1, at 81.

<sup>22</sup> At 83.

assessment stage by the NZNCP that is failing complainants. This outcome also emphasises the need for an appeal mechanism where a claimant believes an NCP reached an incorrect decision.

Research has also confirmed the notion that that the domestic implementation of the Guidelines remains a challenge in a number of countries and that “international law is limited in its reach into domestic spheres for stimulation of implementation”.<sup>23</sup> From this perspective, Cernic suggests that problems with the Guidelines are all “surmountable by strengthening existing system of NCPs”.<sup>24</sup> Trouble with domestic implementation of the Guidelines could be traced back to their voluntary nature. Throughout the guidelines the word “recommendation” is used when referring to the specific conduct the Guidelines suggests. In the first operative paragraph of the Guidelines the voluntary nature is evident:<sup>25</sup>

The Guidelines are recommendations addressed by governments to multinational enterprises ... The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards.

The voluntary nature of the Guidelines is not an issue the NZNCP can address, it is more something to keep in mind when addressing other issues.

Cernic summarises the major problems facing NCPs with the implementation of the Guidelines as:

- a lack of due process (lack of clear procedure, lack of time limits for complaints);
- unequal treatment of parties;
- burden on complainants;
- unwillingness to investigate;
- lack of fact-finding capability; and

<sup>23</sup> Cernic, above n 6, at 77.

<sup>24</sup> At 77.

<sup>25</sup> OECD, above n 1, at 13.

- an unwillingness to declare breaches of the guidelines.<sup>26</sup>

## *V How can the Guidelines be Strengthened?*

It is evident there are some issues with the Guidelines but, as mentioned earlier, many of these can be traced back to whether the NCP is operating effectively. The below suggestions therefore focus on improvements the NZNCP should integrate or what they could stop doing.

### *A Structure the NCP to operate effectively and impartially*

It is evident some NCPs are more conducive at upholding the Guidelines and its core criteria than others. An OECD Watch assessment of 15 years of complaints found that over three-quarters of those resolved positively were achieved by NCPs that had one of three organisational structures:

- A board of independent experts with decision making authority,
- A structure that formally integrates stakeholders into NCP governance, or
- A steering board charged with oversight.<sup>27</sup>

Therefore, the NZNCP should seek to integrate such measures suggested by the OECD Watch.

Impartiality could be another area for improvement for the NZNCP. As the NZNCP is located within MBIE, this could and may have (in the case of Mr and Mrs C) lead to the NCP being more inclined to support business activities. NCPs may lack impartiality by talking to companies about the initial assessment first or interpreting the guidelines in a way that is more favourable to the company. However, there is also the argument that placing the NCP within MBIE is the most sensible idea considering the Guidelines are focused on remedying business conduct. Maybe more independent housing might be a solution to increase perceived impartiality. It is important to remedy this perception of a lack of impartiality,

<sup>26</sup> Cernic, above n 6, at 94.

<sup>27</sup> OECD Watch "Remedy remains Rare: an analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct" (2015) <oecdwatch.org> at 7.

because if people do not feel like a mechanism is impartial, they will lose faith in using it, leaving the NCP redundant.

The majority of NCPs are monopartite, meaning they are composed of representatives of a single ministry. Evidently the NZNCP is monopartite, which may result in a simpler decision-making process as the interests of only one ministry are represented. With a monopartite NCP also comes the perception of a lack of independence, impartiality and possible bias. The NZNCP is housed in the same building that is responsible for promoting business. The issues with a monopartite NCP also lead to the idea that NCPs must take into account the power imbalances that exists between the complainants and companies.<sup>28</sup> Therefore, the NZNCP should seek a structure that fosters equitable treatment and diverse perspectives, to deliver an NCP that is effective and impartial.

#### *B Provide the NCP with adequate resources*

It is stipulated in the Guidelines that “adhering countries shall make available human and financial resources to their NCP”.<sup>29</sup> Adequate resources are essential for an NCP to “effectively fulfil its responsibilities”.<sup>30</sup> However, the NZNCP annual reports reflect that the NZNCP is poorly resourced.

Increasing financial resources is not a real critique on the actions of the NZNCP, rather a critique on the New Zealand Government in how they prioritise funding. The 2017 NZNCP annual report stated that there is no dedicated full-time staff, nor any dedicated part time staff, rather, when required, existing staff assist in the exercise of the NCP function.<sup>31</sup> Having dedicated staff means that they are more familiar with the Guidelines, which can be a real benefit when handling claims. In terms of financial resources, there is no dedicated budget for the NZNCP.<sup>32</sup> However, it has been recorded that the NZNCP did have a dedicated budget to conduct its activities related to specific instances and that financial resources for specific instances were also allocated on an ad hoc basis.<sup>33</sup>

<sup>28</sup> OECD Watch “Our campaign demands for policymakers” (2017) <oecdwatch.org> at 3.

<sup>29</sup> OECD, above n 1, at 68.

<sup>30</sup> At 68.

<sup>31</sup> Ministry of Business, Innovation and Employment [MBIE] *National Contact Point Reporting Questionnaire (2017)* at 3.

<sup>32</sup> At 5.

<sup>33</sup> At 5.

Attaching more resources to the NZNCP may increase its legitimacy and should improve its ability to uphold the guidelines or undertake promotional activities. However, it might be the NZNCP's duty to make a case as to why they are failing and thus require substantial resources.

*C Attach consequences to ensure that the Guidelines are taken seriously*

A multinational enterprise can refuse to participate in the NCP process, such as mediation, and/or fail to implement the recommendations from mediation. Such a decision by a multinational enterprise should follow material consequences. Material consequences can be varied and specific to the non-cooperative multinational enterprise. Attaching material consequences will help create a level playing field and will ensure that businesses failing to respect the Guidelines do not gain a competitive advantage at the cost of other complying business and the affected public. Currently only the Canadian, Dutch, and German governments have all committed to applying consequences in respect of NCP cases.<sup>34</sup>

*D Make a determination of non-compliance*

If mediation fails the NCP, in their final statement they should issue a determination of non-compliance. The OECD Watch *Briefing Paper June 2018* identifies reasons why NCPs did not provide effective access to remedy in 2017.<sup>35</sup> These reasons, whilst not formed solely in light of the NZNCP's performance, can still be readily be applied to the NZNCP. OECD Watch firstly identified that there is an unwillingness to make determinations of non-compliance with the guidelines. Currently only 36 per cent of the 47 total NCPs currently engage in determinations according to their rules of procedure or practice. The benefit of determinations is that it can help companies better understand the Guidelines and what steps they can take to fully observe them.

Evidence indicates that an NCP'S willingness to issue determination of non-compliance with the Guidelines in final statements makes dispute resolution more likely.<sup>36</sup> The

<sup>34</sup> OECD Watch *The State of Remedy under the OECD Guidelines: Understanding NCP cases concluded in 2017 through the lens of remedy* (1 June 2018) <oeedwatch> at 9.

<sup>35</sup> At 6.

<sup>36</sup> OECD Watch, above n 27, at 44.

Norwegian *Peer Review* in 2012 indicated that making a determination provided leverage to encourage parties to engage in dialogue.<sup>37</sup> Business have also indicated that the prospect of a determination makes them more inclined to resolve disputes through mediation.<sup>38</sup> Thus, in a situation where mediation fails, the NZNCP should be mandated to make a compliance determination based on independent and transparent investigations.

If no agreement is reached between the parties, or the company is unwilling to participate, the UK and Norway NCP both have a stage aimed at conducting a thorough examination of the facts. Conducting a thorough examination of the facts allows the NCP to assess whether or not the company is in breach of the Guidelines.<sup>39</sup> The NZNCP as per its “New Zealand NCP specific instances indicative procedures with timeframes” indicates no such stage for conducting an examination of the facts to find whether there has been a breach of the Guidelines. This can be considered a huge loss for the complainant and the general public as conducting an examination of the facts gives the NZNCP more information in order to conclusively decide whether the Guidelines have been breached. This in turn can encourage the company to address their behaviour for fear of bad publicity. The public deserve access to decisions about companies they interact with, decisions that are based on a thorough examination of facts. The United States NCP is consistent with the NZNCP in that it does not make a statement as to whether a violation of the Guidelines has occurred.<sup>40</sup> The United States NCP’s reasoning for this decision is based on the fact the Guidelines are voluntary. Whilst the guidelines are voluntary, the statements released by the NZNCP are not binding on the company, merely informative for the public and all parties involved. For this reason, I do not see a conflict in encouraging the NZNCP to make a determination of non-compliance when it appears a company has breached the Guidelines. Further supporting the idea that the NZNCP should conduct a thorough examination of the facts and then make a conclusion on whether or not the Guidelines have been breached is that these actions are “critically

<sup>37</sup> Norwegian Peer Review Final Report, 2012 at 26.

<sup>38</sup> OECD Watch, above n 27, at 44.

<sup>39</sup> Sanchez, above n 7, at 105.

<sup>40</sup> At 106.

important so that NCPs can fulfil their main objective, to further the effectiveness of the Guidelines”.<sup>41</sup>

Maheandiran, in her call for clarity of the OECD Guidelines argues that as:<sup>42</sup>

... one of the only multilaterally endorsed codes promoting corporate responsibility with a dispute resolution mechanism, clarity on the point of whether NCPs are empowered to determine when a corporation has breached the Guidelines, as with the UK NCP, or to mediate between the parties, as with the Canadian NCP, is essential to the continued legitimacy of the system.

#### *E Increase NCP transparency*

Transparency is one of the core criteria for an effective NCP. Transparency is an area in which the NZNCP could seek to improve. The NZNCP fails to publish all the claims it encounters and to keep its records up to date on its website. This lack of transparency arguably detracts from the legitimacy of the NZNCP and does not encourage accessibility or seek to promote the Guidelines: “Without public scrutiny into a case, companies have little incentive to engage, media attention can generate the pressure necessary to balance the scales and thus nudge the company towards the mediation table.”<sup>43</sup> The increased transparency can help the public become aware of companies that are not practicing responsible business conduct or will allow the media to utilise such information so that they can further alert the public about a company’s potential misconduct.

The NZNCP could also restrict confidentiality to limited and well-defined circumstances such as security and safety concerns, or if all parties agree it is absolutely necessary. The NZNCP should ensure it does not base initial assessments on information that is not available

<sup>41</sup> At 108.

<sup>42</sup> Maheandiran, above n 19, at 243.

<sup>43</sup> OECD Watch, above n 34, at 11.

to both parties. OECD Watch has identified this as an issue, especially for NGOs when NCPs base their final decision on information that is only shared between the company and the NCP.<sup>44</sup> Deciding a case based on information that one party has not accessed and had the opportunity to provide a counter argument is unfair.<sup>45</sup> Whilst there is no evidence of this occurring in with the NZNCP, it ought to be clarified an ensured that information is always shared between both parties.

In the specific instance complaint of Mr and Mrs Y against MNE X, in the final statement the NZNCP held, in the concluding paragraph, that “in the circumstances, no purpose would be served by identifying the parties concerned, so their identities have been anonymised”. Whilst it is entirely understandable to have the complainant’s identity anonymised as to assist complainants feeling secure in their complainants and encourage them coming forward, sharing the identity of complainants would be undesirable given complaints may contain very personal sufferings or other personal details. However, it is in the interest of the NZNCP in pursuit of furthering the effectiveness of the Guidelines, to identify the MNE. Identifying the MNE may help the NZNCP operate in a way that is more in line with the core criteria of the procedural guidance, these being visibility, accessibility, transparency and accountability. The final statement lacks transparency and does not promote accessibility. If the MNE were identified, a potential claimant could then be aware that this MNE has already had a complaint lodged against them.

Conversely, an advocate for MNEs would argue that MNEs are entitled to have their identity remain anonymous due to the Guidelines being soft law and thus non-binding. However, MNEs tend to carry out their business in a public way, their actions can have impacts beyond just their business, and generally are not anonymous entities, they should not be able to pick and choose the circumstances.

While Mr and Mrs Y decided to discontinue their complaint, in this situation, by the public knowing the MNEs identity and holding the necessary facts they could make their own judgements and carry out their lives cautious of this MNE or simply just aware. Whilst this may appear prejudice against MNEs, it could be contended that they have the Guidelines to

<sup>44</sup> At 11.

<sup>45</sup> At 11.

help them achieve this responsible business conduct and the complainant, the person, an individual or family, has the Guidelines to protect them. It is from this perspective of the Guidelines assisting the MNEs to achieve responsible business conduct and the Guidelines protecting claimants from breaches of responsible business conduct that it appears fully justified to identify the MNE in all final statements, increasing the transparency.

#### *F Encourage remedy*

Each NCP is at its core is a grievance mechanism for complainants to seek a remedy. However, OECD Watch found that, of the 250 complaints filed between 2000 and 2015, only 14 per cent had any beneficial results that provided some measure of remedy.<sup>46</sup> For our NZNCP to make the contribution to global governance that it has the potential to, the government must be more explicit in recognising that providing effective access to remedy.

#### *G Promotion*

Promotion can seem a peculiar notion in the realm of law. However, promotion is central to the Guidelines, captured under the core principle of visibility. The NZNCP annual reports consistently indicated no dedicated budget to carry out promotional activities but indicated that financial resources are allocated on an ad hoc basis when requested by the NCP.<sup>47</sup> As consequence, there is a real lack of promotional activities or any promotion of the Guidelines by the NZNCP. The annual report provides for space where an NZNCP can record the promotional events or activities it undertook. The NZNCP has not held any promotional events since 2011.<sup>48</sup> However the promotional activities that have been recorded for 2008, 2009, 2010 and 2011 are dubious at best. In each of those reports, the promotional activity is recorded as “mention of the Guidelines in “introduction to sustainability” workshops for business and “checking that exporters are aware of the Guidelines during voluntary assessments”.<sup>49</sup> There are no dates given and, for each report the same above quote is recorded, illustrating that there had been no growth or diversification in that area over the

<sup>46</sup> OECD Watch, above n 27, at 19.

<sup>47</sup> MBIE, above n 31, at 5.

<sup>48</sup> See all available New Zealand NCP Reports.

<sup>49</sup> MBIE *New Zealand NCP Annual Report (2011)* at 6.

years. In the 2011 Annual Report, under “information and promotion” it was stated: “we aim to raise awareness of the Guidelines in at least one way (typically, a newsletter) each year”.<sup>50</sup> Such a newsletter sent out to multi nationals and target groups of the public could have been an effective way of promoting the guidelines, however on searing for this newsletter none could be found, leading one to believe this was a nice idea that never eventuated. In the 2013 Annual Report it was noted in relation to upholding the core criteria of the Guidelines (visibility, accessibility, transparency and accountability) that the “NZNCP undertakes at least one promotional activity each year”.<sup>51</sup> This is an interesting claim in light of the fact that no promotional activities have ever been recorded by the NZNCP by looking at their annual reports. This lack of eventuation of all suggested and claimed promotional activities could stem from the poor resourcing of the NZNCP. Lack of promotion is detrimental to upholding the core criteria of visibility, and if visibility is not executed properly it has a flow on effect to upholding the other core criteria; accessibility is limited if people are uninformed.

#### *H Peer Learning*

From what can be seen of the NZNCP it appears that there is a lack of peer learning and review.<sup>52</sup> The Guidelines stipulate that “NCPs will engage in joint peer learning activities”.<sup>53</sup> The Guidelines further suggest that NCPs are “encouraged to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations”.<sup>54</sup> It is concerning that the NZNCP has not participated in any peer learning, as collaboration can be a valuable resource in achieving justice. In 2015, the NZNCP indicated that they cooperated with the Australian NCP, by way of discussion over their handling of specific instance cases. In 2013, the NZNCP engaged in direct cooperation with the United States NCP to discuss approaches towards advisory board engagement.<sup>55</sup> Whilst these engagements are something, it is arguably not enough to meet what the Guidelines suggest on peer learning.<sup>56</sup> Peer learning is, therefore, an area in which the NZNCP should seek improvement.

<sup>50</sup> At 7.

<sup>51</sup> MBIE *New Zealand NCP Annual Report (2013)* at 6.

<sup>52</sup> MBIE, above n 31, at 9.

<sup>53</sup> OECD, above n 1, at 81.

<sup>54</sup> At 81.

<sup>55</sup> MBIE, above n 51, at 7.

<sup>56</sup> MBIE *New Zealand NCP Annual Report (2015)* at 11.

## *I Should the New Zealand government be responsible for the maladministration of the NZNCP?*

I pose this question in response to Scott Robinson's discussion on the matter in his article.

Robinson concludes that there does not seem to be any review mechanism, "neither domestically nor internationally, capable of attributing internationally wrongful conduct to an OECD Member State on account of its NCP".<sup>57</sup> Robinson thus claims that states themselves are responsible for their ineffective NCPs and suggests that the OECD "must do more to mandate a more cohesive, competent and proactive effort by states and their NCPs when handling specific instances".<sup>58</sup> Robinson's observations resonate with the current position in New Zealand as the annual reports perhaps highlight the little attention and funding the NZNCP receives. If it can be shown that the Government, by way of international law, is responsible for the NZNCP's maladministration, maybe it can be held accountable.

## *VI Concluding Comments*

While the NZNCP does not appear to be performing as well as it could be, it is important to keep in mind that this judgement is made by looking at a limited number of resources from MBIE about the NZNCP. However, ideas and critiques raised in this report stand and are directly relevant to improving the NZNCP. A proactive approach, rather than a going through the motions approach, could be more beneficial in strengthening the implementation of the Guidelines.

<sup>57</sup> Scott Robinson "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime" (2014) 30 Utrecht Journal of International and European Law at 79.

<sup>58</sup> At 79.